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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 41

A. L. MECHLING BARGE LINES, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the district court (R. 61–65) has not yet been reported.

JURISDICTION

The order of the district court dismissing the complaint was entered on September 16, 1960 (R. 60–61), and the notice of appeal was filed on October 21, 1960 (R. 65–66). On April 3, 1961, this Court postponed the question of jurisdiction to the hearing on the merits (R. 68). The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 2101(b).

QUESTIONS PRESENTED

Section 4 of the Interstate Commerce Act authorizes the Interstate Commerce Commission, after investigation and "in special cases" and under specified conditions, to relieve rail carriers from the prohibitions in that section against charging less for transportation for a longer distance than for a shorter distance. The following questions are presented:

1. Whether a judicial proceeding for review of a Commission order authorizing lower rates for a long haul than for a short haul is rendered moot when the railroads reduce the rates on the short haul to eliminate the differentials prohibited by Section 4.

2. Whether the Commission, after an informal investigation but without a hearing, may grant temporary authority to charge less for a long haul than for a short haul, pending final disposition of an application for permanent authority.

STATUTE INVOLVED

Section 4 of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. 4, provides in pertinent part:

> (1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the

intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further,* That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this part or part III and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further,* That tariffs proposing rates subject to the

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provisions of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

(2) Wherever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points it shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing a complaint to set aside an order of the Interstate Commerce Commission. The Commission order, entered under Section 4 of the Interstate Commerce Act, authorized the appellee railroads temporarily to charge lower rates for long hauls than for short hauls, pending the determination of their application for permanent authority to do so. The district court dismissed the complaint on the ground that the case was moot.

A. THE COMMISSION'S PRACTICE UNDER SECTION 4

Section 4 of the Interstate Commerce Act (*supra*, p. 2) makes it unlawful for any common carrier by rail or water to charge more for transportation for a shorter distance than for a longer distance

over the same line or route in the same direction. It empowers the Commission, however, after investigation and "in special cases," to authorize a carrier to charge less for a long haul than for a short haul, provided that the rate for the long haul is reasonably compensatory, and provided further that there must be some reason for the authorization other than merely potential water competition. Exemption from the statutory long-and-short haul prohibition is commonly known as fourth section relief.

Under the Commission's Rules and Regulations, carriers seeking fourth section relief are required to file a detailed application setting forth the facts and circumstances warranting such authority. See 49 C.F.R. 143.75–143.85. When such an application is filed, the Commission refers it to a staff group of three rate specialists known as the Fourth Section Board, which operates informally. See 49 C.F.R. 1.200. Notice of the application is given in the Federal Register, and protests must be filed within 15 days. Either the applicant or a protestant may request a hearing. The Commission's practice is to order a hearing whenever requested by an interested party. It may also—and sometimes does—order a hearing even though no one has requested it, and even though no protests have been filed.

If, at the end of the 15-day period, no protest has been filed, the Fourth Section Board may either refer the case to the Commission with its recommendation, or decide the case itself. In the latter

event, its ruling is subject to reconsideration by the Commission.

In cases where no hearing is ordered, the Commission (or the Fourth Section Board), on the basis of its study of the application, either grants appropriate relief or denies the application. Although the Commission ordinarily does not make any findings in such cases, it does not grant temporary or permanent authority [1] unless it is satisfied that the statutory criteria therefor are met, namely, (1) that there is a "special case" based on circumstances other than potential water competition and (2) that the long haul rates are "reasonably compensatory." In cases where there is neither protest nor hearing—and these constitute the bulk of the Section 4 proceedings—the Commission ordinarily takes final action on the application within 30 days after filing.

Where the matter is set for hearing, however, the Commission frequently grants temporary authorization pending the hearing and determination of the application for permanent authority. The Commission makes its decision whether to grant temporary relief on the basis of the application, the protest, and any comments by interested parties. Until recently, the Commission generally has not made any findings when granting temporary authority. See *infra*, pp. 33–34.

If the Commission orders a hearing, it may also institute a general investigation of the lawfulness in other respects of the rates affected by the applica-

[1] The Commission uses the term "continuing relief" to describe such permanent authorization.

tion. The two proceedings are usually consolidated for hearing (as was done in this case, see *infra*, p. 8–9.)

The Commission has issued literally many thousands of fourth section permanent authorizations, and several thousand temporary ones. During the period covering the five fiscal years 1956 through 1960, for example, it granted a total of 4911 permanent authorizations; the annual number ranged from 703 in 1959 to 1446 in 1957. During the same period, a total of 285 temporary authorizations were issued; their annual number ranged from 50 in 1960 to 66 in 1959. 70th Annual Report of the Interstate Commerce Commission, p. 59; 71st Ann. Rep., p. 36; 72d Ann. Rep., p. 36; 73d Ann. Rep., pp. 37–38; 74th Ann. Rep., pp. 40–41. The practice of granting temporary fourth section relief has existed for 74 years, ever since the Commission was established in 1887. See 1st Annual Report of the Interstate Commerce Commission, pp. 19–20; 4 Sharfman, *The Interstate Commerce Commission* (1937), pp. 244–246; Monograph of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 10, Part 11, 77th Cong., 1st Sess., pp. 46–47.

B. THE COMMISSION PROCEEDINGS IN THE INSTANT CASE

This case involves rates for the carriage of grain from the Middle West to the East. Appellants are common carriers by water (R. 2–3, 29, 65), who compete with certain of the appellee railroads in the movement of such traffic (R. 3). The grain moves by barge, rail, or truck from producing areas in Northern Illinois to Chicago, and then by rail to the East (R. 3). Prior to January 10, 1959 the railroads

operating between the grain areas and Chicago "had in effect certain reduced rates * * * which rates were allegedly published to meet truck and barge competition on such traffic" (R. 3). The railroads operating out of Chicago to the East had proportional rates on the grain which, in conjunction with the rates from Northern Illinois to Chicago, provided combination rates from Northern Illinois to points in the East (R. 3). "In order to avoid violations of the long-and-short haul provision of section 4 of the Act, the formation of such through combination rates was subject, among other restrictions, to the restriction that the through combination could not be lower than the local rate from Chicago to the involved destination" (R. 3-4.)

In December, 1958, the railroads filed with the Commission tariffs for lower rates on this traffic which, among other things, eliminated the requirement that the through combination rates could not be lower than the local rates from Chicago (R. 4, 30). This would "permit the application of combination rates from origin to final destination which were lower than the local or flat rates from Chicago to the same destination" (R. 4). "Since such rates would be in violation of the long-and-short haul provision of section 4 of the Act," the railroads also filed applications for relief from such provisions (R. 4-5, 30). Protests against the proposed tariffs and petitions for suspension thereof were filed by appellant A. L. Mechling Barge Lines and others, and the railroads filed a reply (R. 5-6, 30).

On January 9, 1959, the Commission (Division 2) instituted an investigation into the lawfulness of the rates proposed by the railroads, and set the matter for hearing (R. 20–21). It also issued an order (R. 14–15)—which is the subject of this litigation—that authorized the railroads to maintain the lower long haul rates "and to maintain higher rates from and to intermediate points." The order was to be effective "until the effective date of the further order to be entered after hearing" in the proceeding for permanent fourth section relief. The order further stated that "The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act" (R. 15).[2] The Commission made no formal findings in issuing the order.

Hearings were held before an examiner in July, 1959 (R. 10, 58). The railroads subsequently filed applications for further fourth section relief covering additional points in Illinois and Wisconsin (R. 15–27). On October 28, 1959, the Commission consolidated those applications with the original application, and reopened the proceedings for further hearings (R. 10, 27–28, 59).

C. THE PROCEEDINGS IN THE DISTRICT COURT

On November 16, 1959, appellants filed a complaint in the district court to set aside and enjoin the enforce-

[2] Such a clause is customarily included in fourth section orders, to indicate that the rates proposed may be challenged in an appropriate proceeding before the Commission as to their effect upon particular persons.

ment of the order of January 9, 1959 granting temporary fourth section relief (R. 1–14). The complaint also sought a declaratory judgment that the Commission is without power to grant such temporary relief in contested cases, at least unless, after hearing, it makes the same findings it makes when granting permanent relief (R. 13).

Prior to the hearing in the district court, the railroads published, effective March 10, 1960, reduced rates from the intermediate points which left the short-haul rates no higher than the long-haul rates (R. 46–48). On March 28, 1960, the railroads then withdrew their pending applications for permanent exemption from the requirements of Section 4 (R. 46), and on March 31, 1960 the Commission advised them that such applications "will be considered as withdrawn" (R. 48). Shortly thereafter, the government and the railroads moved to dismiss the complaint, on the ground that the new tariffs filed by the railroads, and the withdrawal of their application for permanent fourth section relief, had rendered the case moot (R. 40–43, 49).[8]

The district court held that the case was moot, granted the motions to dismiss, and entered a judgment of dismissal (R. 61). In a *per curiam* opinion (R. 61–65), the court stated that it was its "duty * * * to 'decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot

[8] They also urged (R. 40, 43–44, 49) that the plaintiffs were not entitled to a declaratory judgment. The district court did not reach the question. See *infra*, p. 27, n. 10.

affect the matter in issue in the case before it' " (R. 64). It ruled (R. 65):

> There is nothing pending in the case before us. The cause of any controversy that existed has been terminated by dismissal [of the application before the Commission]. To lay down rules of practice for future guidance of the Commission would be nothing more than the substitution of judicial for executive administration.

SUMMARY OF ARGUMENT

I

Section 4 of the Interstate Commerce Act prohibits a carrier from charging lower rates for a longer distance than for a shorter distance over the same route in the same direction, unless authorized by the Interstate Commerce Commission. In the present case, the Commission granted appellee railroads temporary relief from this prohibition, pending a hearing on their application for permanent relief. After appellants had filed their complaint in the district court challenging the order granting temporary relief, the railroads lowered their short-haul rates to the level to which they previously had reduced their long-haul rates, and thus eliminated the differential prohibited by Section 4. They also withdrew their application for permanent fourth section relief.

In these circumstances, the district court correctly dismissed the case as moot. The elimination of the differentials in favor of long-haul shipments rendered academic the only issue properly before the district court—the validity of the Commission's order tem-

porarily authorizing such differentials. That order affected only those rates with respect to which the application for relief was filed, and when the differentials were terminated, the order ceased to have operative force.

Appellants are actually seeking an advisory opinion as to the validity of the procedures followed by the Commission in granting temporary fourth section relief—not because there is any outstanding order which injures them, but because of the possibility that future orders may injure them. But the duty of the federal courts "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills* v. *Green*, 159 U.S. 651, 653. This Court has frequently rejected the contention that a controversy, otherwise moot, continues to exist merely because of the alleged need for an adjudication of the validity of the general practice involved.

Nor does the case cease to be moot because of appellants' claim that a judicial adjudication of the validity of the order granting temporary relief is necessary to enable them to maintain an action for damages against the railroads. The Commission concedes that this particular order is invalid for lack of findings (see Point II, *infra*), and the effect of such an order upon appellants' right to recover damages can be fully determined in any suit they may bring. Furthermore, there is serious question whether an action for damages may be maintained against a carrier for acts done in reliance upon a

Commission order that is subsequently invalidated for lack of adequate findings or failure to hold a hearing. Indeed, we know of no instance in which a competing carrier has maintained an action for damages against another carrier based on the latter's alleged violation of Section 4.

II

If the Court should conclude that the case is not moot, we acknowledge that this particular order cannot stand. We recognize that, at least in contested cases, the Commission, in order to grant such relief, must make findings showing that, to the degree necessary to justify temporary relief, the statutory criteria have been satisfied. The findings must show that this is a "special case" (*i.e.*, one in which the reduction in the long-haul rates was made to meet competition); that the lower long-haul rate is reasonably compensatory; and that such rate has not been reduced to meet "merely potential" water competition.

There is no merit, however, to the two other grounds upon which appellants challenge the order—namely, that it was entered without a hearing and that the requisite statutory investigation was not made.

A. In contrast to many other provisions of the Interstate Commerce Act, Section 4(1) does not require the Commission to hold a "hearing" before it grants fourth section relief, but only to conduct an "investigation." The distinction is not inadvertent. The very next paragraph of the statute, Section 4(2), provides that once long-haul rates have been reduced

under Section 4(1), they may not be raised unless, "after hearing," the Commission finds that such proposed increase rests upon changed conditions other than the elimination of water competition.

The distinction between "hearing" and "investigation," moreover, is one which Congress has repeatedly considered in its study of Section 4. The history of this consideration shows that Congress was repeatedly advised of the Commission's practice of granting temporary fourth section relief without hearing, and that it rejected proposals to amend the Act to require a hearing. In these circumstances, Congress must be deemed to have acquiesced in the Commission's settled view that the "investigation" required by Section 4 does not include an evidentiary hearing.

B. The Act authorizes the Commission to grant fourth section relief only "after investigation." Appellants argue (Br. 31–32, 36) that the Commission's initiation of a formal investigation of the application for permanent relief at the same time that it granted temporary relief, shows that the Commission had not made the requisite statutory "investigation" when it granted temporary relief. This argument overlooks a basic distinction between the two types of investigation, and fails to recognize the well-established authority of administrative agencies to take action that, although itself meeting the statutory standards, may be subject to reconsideration after further examination and study.

The Commission's determination whether to grant temporary fourth section relief pending a hearing on the application for permanent relief, is made on the basis of a careful study of the application, the

protest, and any comments by interested parties. The application for fourth section relief is a lengthy document containing detailed information on all significant aspects of the proposal, which is sufficient to enable the Commission to make an informed judgment whether temporary relief would be consistent with the standards of Section 4. The formal investigation and hearing of the application for permanent relief is designed to permit a fuller exploration of the issues than was possible in the Commission's consideration of the need for temporary relief. But the initiation of such formal investigation, even though done simultaneously with the granting of temporary relief, provides no basis for implying that the earlier informal investigation was in any sense inadequate or failed to meet the statutory requirement of "investigation." It merely indicates that the Commission will reexamine the original grant of relief, on the basis of the record made in the subsequent hearing, to decide whether the relief should be made permanent. This Court's decision in the *New England Divisions Case*, 261 U.S. 184, supports the validity of the Commission's practice of granting temporary relief upon a thorough informal investigation of the proposal, subject to further consideration upon completion of the formal investigation.

ARGUMENT

The substantive issues in this case relate to the authority of the Interstate Commerce Commission to grant temporary relief from the long-and-short haul prohibitions in Section 4 of the Interstate Commerce Act, pending Commission determination of an applica-

tion for permanent relief therefrom. Appellants here challenge, as they did in the district court, both the Commission's authority to grant any temporary relief, and the validity of the order granting such relief in this case. The latter is attacked because it was entered without findings and without a hearing. The district court found it unnecessary to decide any of these questions, since it held that the case was moot.

In Point I, we shall argue that the district court correctly dismissed the case as moot, and that this Court should therefore affirm the judgment of the district court. If this Court, however, should hold that the case is not moot, the normal practice would be to reverse the judgment of the district court, and to remand to that court to consider the other issues, both substantive and procedural, which it did not decide. Cf. *Federal Trade Commission* v. *Anheuser-Busch*, 363 U.S. 536, 542. In this case, however, the substantive questions are purely legal; there are no factual issues in the resolution of which an analysis of the record by the lower court would be of assistance; the record is slim; the issues have been fully canvassed and briefed before this Court; and they are of general importance and warrant decision by this Court. In these circumstances, we believe that it would be appropriate for this Court, if it reaches the merits, to decide them itself rather than to remand to the district court to decide them in the first instance. Cf. *O'Leary* v. *Brown-Pacific Maxon*, 340 U.S. 504, 508.

In Point II, we shall accordingly discuss the merits. We shall there argue that the Commission may

grant temporary fourth section relief without a hearing, and that such grant may be made even though the agency simultaneously orders an investigation and hearing into the application for permanent authority. We concede that, at least in contested cases, the Commission must make explicit findings with respect to the statutory criteria for granting such relief. Since the Commission, in granting temporary fourth section relief in this case, made no such findings, we recognize that its order cannot stand.

Since the Court has postponed the question of jurisdiction to the hearing on the merits, Rule 16(4) of the Revised Rules requires us to discuss the jurisdictional issue at the outset. We think it clear that the Court has jurisdiction of this appeal. Section 1253 of Title 28 provides that any party may appeal to this Court "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an act of Congress to be heard and determined by a district court of three judges." Proceedings to review orders of the Interstate Commerce Commission are required to be heard by a three-judge court, and the customary form of such proceeding is an action to enjoin, suspend and set aside the Commission order. See 28 U.S.C. 1336, 2321–2325.

The complaint in this case sought to "enjoin" the Commission's order granting temporary fourth section relief (R. 1, 12). The order of the district court, from which this appeal is taken, dismissed

the complaint and "denied" "the relief therein prayed for" (R. 61). That order plainly was one "denying * * * [a] permanent injunction in [a] civil action, suit or proceeding" within the meaning of 28 U.S.C. 1253, and it was also a final judgment. See 28 U.S.C. 2101(b).

The fact that the district court dismissed the complaint and denied injunctive relief upon the ground that the case was moot, does not affect the jurisdiction of the Court to hear the appeal. Where a case becomes moot while on appeal, the proper disposition by the appellate court "is to reverse or vacate the judgment below and remand with a direction to dismiss. * * * That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." (*United States* v. *Munsingwear*, 340 U.S. 36, 39–40). Where, however, as here, the case became moot while it was still pending in the lower court and the latter then dismissed for that reason, the proper disposition by the appellate court, if it agrees that the case was moot, is to affirm the judgment of dismissal. For the issue on appeal is whether the case was correctly dismissed as moot; that presents a real controversy between the parties; and an affirmance on that ground does not bar future relitigation of the substantive issues between the parties. The government contends that the district court correctly dismissed the action as moot; if the Court

agrees, the proper form for implementing that decision is to affirm the judgment of dismissal.[4]

I

THE DISTRICT COURT CORRECTLY HELD THAT THE CASE IS MOOT

1. The complaint in the district court attacked, and sought to enjoin, the Commission's order granting the appellee railroads temporary authority to charge lower rates on grain moving from Northern Illinois through Chicago to the East than on grain moving from Chicago (and other intermediate origins) to the same eastern destinations. Unless authorized by the Commission, such rate differentials are prohibited by Section 4 of the Interstate Commerce Act. While the case was pending in the district court, however, the railroads eliminated the differentials by reducing their rates on the short haul to the level of those on the long haul, and withdrew their application for permanent authority to maintain the previous differentials.

The result of these changes in rates was to render moot the only issue properly before the district court—the validity of the temporary authorization of lower long-haul rates (see *infra*, pp. 22–27, 31, n. 11). The

[4] Section 2105 of Title 28 does not dictate a contrary result. It provides: "There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction." The holding below that the case was moot, however, does involve jurisdiction, since if that ruling is correct, there was no case or controversy before the district court. Cf. *Snyder* v. *Buck*, 340 U.S. 15, 21–22.

Commission's fourth section order operated only prospectively, and it ceased to have any operative effect as soon as the rate differentials which it authorized were eliminated. In these circumstances, the district court properly dismissed the case as moot.

The duty of the federal courts "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills* v. *Green*, 159 U.S. 651, 653; see *Local No. 8–6, Oil Workers Union* v. *Missouri*, 361 U.S. 363; *Bus Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 416.

Indeed, this Court has already recognized, in circumstances strikingly similar to those in the present case, that the termination or cancellation of lower long-haul rates, challenged as illegal under Section 4, renders moot any controversy as to the validity of a fourth section order temporarily authorizing such rates. *Atchison, T. & S.F. R. Co.* v. *Dixie Carriers, Inc.*, 355 U.S. 179. In that case the railroads had filed tariffs with lower rates for longer distances than for shorter distances, and an application for fourth section relief. The Commission initially had suspended the rates; it subsequently vacated the suspension order, and granted temporary fourth section relief pending further order after hearing. The competing water carriers then filed a complaint in the district court challenging both the order vacating the suspension, and that granting the temporary fourth

section relief. The district court held both orders invalid, and set them aside. *Dixie Carriers, Inc.* v. *United States*, 143 F. Supp. 944 (S.D. Tex.). The government and the rail carriers appealed, challenging the rulings on both orders, and this Court noted probable jurisdiction. 353 U.S. 906.

Thereafter all parties filed a joint memorandum suggesting mootness. They stated (Memorandum Suggesting that the Cause is Moot, Nos. 60, 61, 62, O.T., 1957, p. 3) that, subsequent to the noting of probable jurisdiction, the Commission had completed its investigation of the rate schedules involved, had concluded that certain of the rates had not been shown to be just and reasonable, and had ordered their cancellation and denied the application for fourth section relief. They concluded (*ibid.*) that since the Commission's final order required cancellation "of the rate schedules involved in the orders enjoined by the District Court * * * the propriety of the Commission's earlier actions vacating its suspension order and granting temporary Fourth Section relief is now only of academic interest." The parties therefor requested that the judgment of the district court be vacated and the case remanded with directions to dismiss the complaint (*ibid.*) This Court, "[u]pon the suggestion of mootness," entered such an order. 355 U.S. 179. Cf. *Arkansas & Louisiana Missouri Ry. Co.* v. *Amarillo-Borger Express, Inc.*, 352 U.S. 1028, involving a similar situation relating to the mootness, pending appeal, of a Commission order vacating an order suspending rates (no order under Section 4 was

involved). See, also, *Sprunt & Sons, Inc.* v. *United States*, 281 U.S. 249, and *United States* v. *Anchor Coal Co.*, 279 U.S. 812, where changes in the rates under judicial review were held to have rendered moot the controversy over their validity.

2. Although there is thus no present controversy between the parties over any existing rate schedule,[3] appellants nevertheless contend (Br. 17) that the case is not moot because there is a controversy "over the continuing practice of the Commission in granting 'temporary' authority for Fourth Section departures to the Railroads over the protests of the appellants and without any hearing or findings in the order granting such authority * * *." In other words, appellants are seeking an advisory opinion, wholly unrelated to any particular threatened injury to them, as to the general validity of the Commission's practice and procedure in granting temporary fourth section relief.

Appellants are not entitled to such an adjudication. "The pronouncements, policies and program" of the Commission "did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining. The judicial power does not extend to the determination of abstract ques-

[3] The reduced rates on both the long-haul and the short-haul traffic are still in effect. Appellants may at any time challenge their reasonableness by filing a complaint with the Commission under Section 13(1) (49 U.S.C. 13(1)) of the Act. See *United States* v. *Merchants & Manufacturers Traffic Association*, 242 U.S. 178, 188.

tions. * * * Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention." *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 324–325.

Southern Pacific Terminal Company v. *Interstate Commerce Commission*, 219 U.S. 498, upon which appellants principally rely (Br. 18–21), does not support their claim for a judicial determination of the validity of the Commission's general practice in issuing temporary fourth section orders. In the *Southern Pacific Terminal* case, the Commission ordered the terminal company to cease and desist for a two-year period (the maximum permitted by law),* from giving undue preference and advantages to a particular shipper. The district court upheld the order and, while the case was pending before this Court, the order by its terms expired. The Commission contended that "the case is [therefore] now moot" and that the appeal should be dismissed. 219 U.S. at 510. This Court held that the case was not moot. It stated (p. 515):

> * * * The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review * * *.

This statement, however, must be read in the light of the case before the Court. Since the Commission

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*The Hepburn Act of 1906 limited the duration of all Commission orders (other than for the payment of money) to two years. 34 Stat. 589. This limitation was repealed by the Transportation Act of 1920. 41 Stat. 484.

had held that the particular advantages given by the terminal company to the shipper were illegal, an order prohibiting them for only two years was "capable of repetition" in the sense that, if the company resumed the same illegal practice after the order expired, an identical order (except for the new expiration date) presumably would be issued after further proceedings. In such circumstances, the controversy between the parties as to the legality of the underlying practice continued, even though the particular short-term order prohibiting it was no longer in effect.

In the present case, however, the particular fourth section order involved (that is, one covering the same points and the same rates) is not, in any realistic sense, "capable of repetition" (*Southern Pacific Terminal, supra*). The railroads have reduced their short-haul rates to the level of the long-haul rates, and any establishment of new differentials between such rate levels would have to be evaluated by the Commission in the light of the different factual situation then existing. Indeed, the ground upon which appellants seek relief is not that this order is likely to be repeated, but that the Commission may enter similar orders in other cases involving different rates, and that an adjudication of the Commission's general "practice" of entering such orders should therefore be made (Br. 17, 20).

This Court, however, has consistently rejected the argument that a controversy, otherwise moot, continues to exist because of the alleged need for an adjudication of the validity of the general practice involved.

This view was recently reiterated in *Local No. 8-6, Oil Workers Union* v. *Missouri*, 361 U.S. 363; *Harris* v. *Battle*, 348 U.S. 803. Both cases involved the validity of state laws authorizing the governor to seize public utility companies whose employees are on strike; in both, the strike was settled and the seizure terminated during the pendency of the litigation challenging the constitutionality of the seizure. In *Oil Workers*, this Court pointed out (p. 368) that in *Harris* the state court proceeded to decide the merits and held the seizure constitutional, even though the seizure had terminated. It stated (pp. 368–369, footnotes omitted):

> * * * In this Court it was urged [in *Harris*] that the controversy was not moot because of the continuing threat of state seizure in future labor disputes. It was argued that the State's abandonment of alleged unconstitutional activity after its objective had been accomplished should not be permitted to forestall decision as to the validity of the statute under which the State had purported to act. It was contended that the situation was akin to cases like *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U.S. 498, 514–516. In finding that the controversy was moot, the Court necessarily rejected all these contentions. 348 U.S. 803. Upon the authority of that decision the same contentions must be rejected in the present case.

Appellants contend (Br. 20–21), however, that unless they secure a judicial determination of the validity of the Commission's general practice, they cannot obtain review of an individual temporary fourth sec-

tion order, since "[t]he orders continue in effect for terms too short under normal circumstances to allow sufficient time to complete judicial review * * *." Appellants themselves, however, did not seek judicial review of the Commission's order for more than ten months after its issuance,[7] and they cannot now properly complain because, after they filed their complaint, the railroads reduced the short-haul rates to eliminate the differential prohibited by Section 4. In so doing, the railroads acted fully within their authority. Section 4 did not deprive them of "the power which they originally possessed, to initiate rates; that is, the power, in the first instance, to fix rates or to increase or to reduce them" (*Skinner & Eddy Corporation* v. *United States*, 249 U.S. 557, 564). Indeed, the railroads still have "the option, if relief from the operation of the fourth section is denied, to keep in effect the low rate to the more distant point by lowering the rates to intermediate points" (*id.*, pp. 566–567). *A fortiori*, they may do so after they have been granted temporary relief, while the application for permanent relief is still pending.

It is true, as appellants point out (Br. 22), that there have been three other cases (in addition to the present one) in which pending judicial proceedings to review temporary fourth section orders have been rendered moot either by subsequent Commission decision in the permanent application[8] or by the action

[7] The order was issued on January 9, 1959 (R. 14–15), and the complaint was not filed until November 16, 1959 (R. 1).

[8] The *Dixie Carriers* case, *supra*, pp. 20–21. In that case the Commission denied the application for permanent fourth section relief.

of the railroads in revising their tariffs to eliminate the challenged rates.[9] But these isolated examples do not support the broad claim that judicial review of particular fourth section orders cannot be obtained.

Nor can appellants draw any comfort from the Declaratory Judgment Act, which they invoked in the district court (R. 1, 13) and upon which they rely here (Br. 25–27). For the Act only applies to "case[s] of actual controversy" (28 U.S.C. 2201), "a phrase which must be taken to connote a controversy of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts" (*Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 325). If, as we believe, this case became moot when it was before the district court, there was no case or controversy before that court, and that court had no jurisdiction to render a declaratory or any other kind of judgment.[10]

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[9] In *American Commercial Barge Line Company* v. *United States*, Civil No. 11772 (S.D. Tex.), the railroads revised their tariffs approximately a year after the case had been argued and submitted to the district court. In *Coasturise Line* v. *United States*, 157 F. Supp 305 (N.D. Calif.), the revisions were made before the case came on for hearing in the district court. The court had previously granted temporary restraining orders against the lower long-haul rates.

[10] Since the district court held that the case was moot, it did not reach the contention of the government (R. 40, 43–44) and the appellee railroads (R. 49) that review of orders of the Interstate Commerce Commission may be had only under the Urgent Deficiencies Act, and not under the Declaratory Judgment Act. The latter Act cannot "be used as a substitute for statutory methods of review" (*Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237, 246). The sole method that Congress has provided for review of orders of the Interstate Commerce Commission is the Urgent Deficiencies Act (28 U.S.C.

3. Appellants further contend (Br. 23–25) that the case is not moot because the Commission has not vacated its order granting temporary fourth section relief; and that such order, unless vacated, bars any action by them against the railroads for damages based on the latter's possible violation of Section 4. They suggest that such an action for damages would be authorized by Section 8 of the Act (49 U.S.C. 8), which makes any common carrier which violates the Act liable in damages to "the person or persons injured thereby."

Although the order is invalid for lack of findings (see *infra*, pp. 32–33), there is no need for its formal rescission or vacation. For under the Commission's settled practice the order ceased to have any effect when the railroads withdrew their application for fourth section relief and published new rates that complied with Section 4. *Vicksburg, S. & P. Railway* v. *Anderson-Tully Co.*, 256 U.S. 408, 416; *L. P. Maggioni & Co.* v. *Atlantic Coast Line R. Co.*, 272 I.C.C. 127, 131; *Watters-Tonge Lumber Co.* v. *Southern Ry. Co.*, 186 I.C.C. 342. What appellants apparently are seeking, therefore, is not merely a vacation of the order, but a judicial adjudication of its invalidity, for use in a possible damage action. In the circumstances of this case, however, the alleged need for such an ad-

1336, 2321–2325). Suits under that Act must be brought against the United States (28 U.S.C. 2322). While Congress has consented to such suits, it has not waived sovereign immunity to authorize proceedings against the United States which seek review of Commission orders under the Declaratory Judgment Act. See *Isner* v. *Interstate Commerce Commission*, 90 F. Supp. 361, 365–366 (E.D. Mich.); *Noeding Trucking Co. v. United States*, 29 F. Supp. 537, 554 (D.N.J.).

judication is not sufficient to create a justiciable controversy.

In the first place, there is serious question whether an action for damages may be maintained against a carrier for acts done in reliance upon a Commission order that is subsequently invalidated for lack of adequate findings or failure to hold a hearing. Cf. *Atlantic Coast Line R. Co.* v. *Florida*, 295 U.S. 301; *Arizona Grocery Co.* v. *Atchison, T. & S.F. R. Co.*, 284 U.S. 370. Secondly, and more important, the validity of the temporary fourth section order, and its effect on appellants' right to recover damages, can be fully determined in any damage suit they may bring. Appellants themselves concede (Br. 24–25) that their "right to such damages * * * is a collateral issue which cannot properly be made a subject of this proceeding." They are not entitled to an adjudication of the invalidity of the Commission's order solely because such a ruling might aid them in a possible action for damages—a type of action which, as far as we know, has never before been instituted. We are aware of no case in which a competing carrier (as distinguished from a shipper) has maintained an action for damages against another carrier based upon the latter's establishment of lower rates alleged to be in violation of Section 4(1), or, indeed, for violation of any other provision of the Act.

There is language in *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U.S. 433, which indicates that the possible impact of a Commission order in a future damage suit may prevent a case challenging the order from being moot, even though

the order itself is no longer operative. In that case (which was decided the same day as the *Southern Pacific Terminal* case, *supra*), the Commission had ordered the railroads to reduce certain rates which it found were unreasonable, and the district court had upheld the order. The order by its terms expired in two years. This Court rejected the argument that, since the order had expired, the case before it was moot, since it deemed the issue "disposed of" by the *Southern Pacific Terminal* case. 219 U.S. at 452. The Court further stated (*ibid.*), however, that "[i]n addition to the considerations expressed in that case it is to be observed that clearly the suggestion [of mootness] is without merit, in view of the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future."

This statement, however, is inapplicable to the present case for two reasons. (1) The rate structure established by the Commission's order in the *Southern Pacific* case was still in effect and had a continuing impact upon future rate developments. In the present case, however, the differentials between the long and the short haul rates authorized by the temporary fourth section order are no longer in effect. (2) As long as the *Southern Pacific* order declaring the old rates unreasonable was unreversed, the railroads remained subject to possible liability to shippers for reparations, based on the collection of rates that

had been held to be unreasonable. In the present case, however, the invalidity of the temporary fourth section order is not disputed; and the only issue in the damage suit with respect to that order would not be its validity, but the validity of rates collected while it was in effect. The latter issue, as we have indicated, is one that can be fully litigated in the damage suit. There is accordingly no need for a judicial adjudication of what the Commission has already conceded, namely, that the temporary fourth section order is invalid.

II

THE COMMISSION MAY, WITHOUT A HEARING, GRANT TEMPORARY RELIEF FROM THE LONG-AND-SHORT HAUL PROHIBITIONS IN SECTION 4 AFTER INFORMAL INVESTIGATION AND UPON APPROPRIATE FINDINGS, EVEN THOUGH IT SIMULTANEOUSLY INSTITUTES A FORMAL INVESTIGATION OF THE APPLICATION FOR PERMANENT RELIEF

Appellants challenge the Commission's order granting temporary fourth section relief on three grounds: (1) the order was entered without a hearing; (2) no formal findings accompanied it; and (3) since simultaneously with its issuance, the Commission directed a hearing on the application for permanent fourth section relief, the agency had not completed the investigation that the Act requires before any fourth section relief may be granted.[11]

[11] In addition to directing a hearing upon the railroads' application for permanent fourth section relief (R. 14), the Commission simultaneously entered a separate order instituting an "investigation" into the "lawfulness" and "reasonableness" of the proposed rates (R. 21). To the extent that appellants rely upon the investigation instituted by the latter order (App.

Section 4 permits the Commission, after investigation and "in special cases," to grant relief from the long-and-short haul prohibitions, provided that the lower long-haul rate is reasonably compensatory, and provided further that such relief is not granted to meet "merely potential" water competition. In issuing the temporary fourth section order here involved, the Commission made no explicit findings in terms of the foregoing statutory criteria. The order merely recited that it was made "[u]pon consideration of the matters and things involved" in the fourth section application, "which application, as amended, is hereby referred to and made a part hereof" (R. 14).

We concede that, because of the absence of any findings that the statutory criteria for fourth section relief were met, the Commission's order granting temporary relief cannot stand. We recognize that, at least in contested cases in which there is objection to the application for relief, the Commission, in order to grant such relief, must make findings showing

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Br. 15, 31–32), they confuse a proceeding under Sections 13(2) and 15(7) concerning the general reasonableness of rates with a proceeding under Section 4 involving relief from the long-and-short haul prohibitions. The standards in the two proceedings are quite different. A rate may be reasonable under all other criteria, and yet be illegal under Section 4 because of a forbidden differential between the long and the short-haul rates; conversely, such a differential may satisfy the criteria of Section 4, and yet the long-haul rate itself may violate the Act because it is unreasonable or discriminatory. See *Seatrain Lines, Inc.* v. *United States*, 168 F. Supp. 819, 824 (S.D.N.Y.); cf. *Davis* v. *Portland Seed Co.*, 264 U.S. 403. Because of this basic difference, the pendency of a general rate investigation casts no doubt upon the validity of relief granted under Section 4.

that, to the degree necessary to justify temporary relief, the statutory criteria have been satisfied.[12]

The Commission's practice in making findings in connection with temporary fourth section relief has varied. At an early period, it made findings in issuing all such orders. As time went on, however, and the volume of such temporary authorizations greatly increased, the Commission fell into the practice of granting such authority in the form followed in the instant case. In recent years, however, several judicial decisions have held this practice invalid,[13] and as a result, the Commission has changed its practice

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[12] There are two areas, however, in which we think it clear that the Commission need not make specific findings in connection with the grant of temporary fourth section relief.

1. Where a railroad voluntarily establishes reduced rates for certain shipments into a disaster area, as specifically authorized by Section 22, the Commission grants temporary fourth section relief without purporting to find that such reduced rates are reasonably compensatory. To require such a finding would frustrate the beneficent purposes of Section 22.

2. When the Commission permits the railroads to put into effect a general rate increase, it finds it necessary to grant general temporary fourth section relief for a specified period during which the railroads are directed to identify and eliminate violations of Section 4(1). In this situation, it would be impossible for the Commission to make meaningful specific findings in terms of the criteria of Section 4(1). See *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, 491, 492–493, 495.

In uncontested fourth section cases, the Commission ordinarily does not make any findings. Many or most of such cases involve minor or technical violations of Section 4 in which no one other than the particular carrier concerned has any interest.

[13] *Dixie Carriers, Inc.* v. *United States*, 143 F. Supp. 844 (S.D. Tex.); *Seatrain Lines, Inc.* v. *United States*, 168 F. Supp. 819 (S.D.N.Y.).

again. The Commission currently does make findings when it grants temporary relief in contested cases. The type of findings that the Commission now makes is illustrated in the recent temporary fourth section authorization set forth in Appendix A, *infra*.

Since the Commission's temporary fourth section order is invalid for lack of findings, we think it unnecessary for the Court to consider the two other grounds on which appellants attack it, namely, (1) the failure to hold a hearing, and (2) the alleged inconsistency between granting temporary relief and simultaneously instituting an investigation of the permanent application, when the Act permits relief only "after investigation." But in view of appellants' attack on the Commission's general practice of issuing temporary orders under these circumstances, and the further fact that one of the grounds upon which they argue that the case is not moot is the need for a determination of the validity of that practice, we shall show that neither challenge has merit.

As noted in the Statement (*supra*, p. 7), the Commission has been granting temporary fourth section relief since the long-and-short haul provision was first enacted in 1887 as part of the original Interstate Commerce Act. There have been repeated attempts by the railroads to repeal or modify its prohibitions, primarily on the ground that it unduly restricts their ability to compete with water carriers. Conversely, the water carriers have sought to strengthen the prohibitions, on the ground that they have not been adequate to protect them against predatory rate practices by the railroads. As we shall show, the history of

Congressional action on these conflicting proposals supports the validity of the Commission's settled practice of (1) granting temporary relief without a hearing and (2) simultaneously instituting a formal general investigation and a hearing on the application for permanent relief.

A. A FORMAL HEARING NEED NOT PRECEDE A GRANT OF TEMPORARY FOURTH SECTION RELIEF

In contrast to many other provisions of the Interstate Commerce Act,* Section 4(1) does not require the Commission to hold a "hearing" before it acts, but only to conduct an "investigation." The distinction is not inadvertent. For the very next paragraph of the statute, Section 4(2), provides that once long-haul rates have been reduced under Section 4(1), they may not be raised unless, "after hearing," the Commission finds that such proposed increase rests upon changed conditions other than the elimination of water competition. The use of these two distinct terms in different sections of the Act, and particularly in different subdivisions of the same section, demonstrates that the "investigation" contemplated by Section 4(1) is not the trial-type "hearing" required for other purposes. This is the holding of the only district court decision on this issue, *Seatrain*

* "49 U.S.C. Sections 1(14)(a) (car service rules), 1(15) (same), 1(19) (extension and abandonment), 3(1a) (export rates), 5(1) (pooling agreements), 5(2)(b) (mergers), 5(7) (same), 5(16) (operation of competing water carrier), 13(3) (State-authorized rates), 15(1) (rate investigations), 15(3) (joint rate divisions), 15(6) (same), 15(7) (new rate investigations), 15(13) (payments to shippers), 16(1) (reparations), 19a(i) (valuations).

Lines, Inc. v. *United States*, 168 F. Supp. 819 (S.D. N.Y.). Cf. *Jordan* v. *American Eagle Fire Insurance Co.*, 169 F. 2d 281 (C.A.D.C.). There are contrary dicta, cited by appellants (Brief, p. 32), in *Louisville & N. R. Co.* v. *United States*, 225 Fed. 571, 580 (W.D. Ky.), affirmed, 245 U.S. 463, and *Dixie Carriers, Inc.* v. *United States*, 143 F. Supp. 844, 854 (S.D. Tex.), judgment vacated and case remanded with directions to dismiss, 355 U.S. 179.

The distinction between "hearing" and "investigation," moreover, is one which Congress has repeatedly considered in its study of Section 4. The history of this consideration shows that Congress was repeatedly advised of the Commission's practice of granting temporary fourth section relief without hearing, that it rejected proposals to amend the Act to require such hearings, and that it therefore must be deemed to have acquiesced in the Commission's settled view that the "investigation" required by Section 4 does not include an evidentiary hearing.

In 1923 a Senate resolution directed the Commission to report the following information about its administration of Section 4 since 1906:

> (a) The number of applications in special cases for relief from the operation of such section filed with the commission, granted by the commission, granted by the commission after investigation, including hearing, denied by the commission, or denied by the commission after investigation, including hearing * * *.

The Commission's response [15] showed that of almost 10,000 applications on which final action was taken after investigation, hearings had been held on less than 1400.

One week after the Commission filed its report, the Senate Interstate Commerce Committee held hearings on a bill to amend Section 4.[16] This bill would have prohibited the Commission, except in cases of emergency such as drought or disaster, from granting fourth section relief except "after public hearing." Members of the Commission who testified on the proposed bill were divided in their views. Chairman Hall, speaking for the majority, noted that the Commission had granted without a hearing "what is sometimes called temporary relief, or interim relief, pending the determination of the main question," [17] and said that such temporary relief not only was required for orderly regulation because of a large number of applications but was warranted by the factual showings made in the applications provisionally granted.[18] Commissioner Campbell, however, stated his personal view that the Commission had exceeded its powers in granting temporary relief and in proceeding without hearings.[19]

The Committee reported the bill favorably, concluding that "the continuance of such policy [of failing to

[15] Administration of Section 4 of the Interstate Commerce Act, 87 I.C.C. 564.

[16] S. 2327, 68th Cong., 1st Sess.

[17] Hearing on S. 2327 Before the Senate Committee on Interstate Commerce, 68th Cong., 1st Sess., 365.

[18] *Id.* at 462–463. See also the Commission's letter to the Committee, *id.* at 875–885.

[19] *Id.* at 5–7.

hold hearings] on the part of the Interstate Commerce Commission can only be stopped by a strict prohibition."[20] The bill passed the Senate,[21] but was never enacted into law.

After 1924, the Commission continued its practice of granting temporary relief, and of disposing of applications for both temporary and permanent relief without hearing where none was requested.[22] The railroads, however, continued to urge repeal of Section 4, partly on the ground of delays in the granting of relief.[23]

In 1938, Commissioner Eastman testified before the Senate Commerce Committee, in hearings on bills to amend Section 4, that temporary relief was being granted in a large number of cases in an average of 23.8 days from the application.[24] This short period clearly did not allow for formal hearings. Congress was impressed with the complaint of the railroads that they could not file tariffs for the proposed rates until after Section 4 relief had been granted, and that it was then necessary to wait an additional 30 days (under Section 6(3)) before the reduced rates could become effective. The hearings resulted in the proviso to Section 4 that permits the railroads to file

[20] S. Rep. No. 302, 68th Cong., 1st Sess., 5.

[21] 65 Cong. Rec. 8888.

[22] See 4 Sharfman, *The Interstate Commerce Commission* (1937), 245–246.

[23] See Hearing on H.R. 1668 Before the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., 18–22, 446; Hearings on S. 1356 and H.R. 1668 Before the Senate Committee on Interstate Commerce, 75th Cong., 3d Sess., 1–2, 796–797.

[24] Hearings on S. 1356 and H.R. 1668, *supra*, at 797.

changes in the affected tariffs together with applications for relief under that section, and authorizes the grant of relief effective on one day's notice."[25] The Senate Committee report on the bill stated that its purpose was "to permit those rates which involve a departure from the long-and-short haul clause, but which are approved by the Commission, to become effective at an earlier date than is possible under present procedure."[26]

The Commission's practice of granting temporary relief without hearing was described in detail in 1941 by the Attorney General's Committee on Administrative Procedure.[27] Three years later, it was again fully explained in a report submitted to the President and Congress by the Board of Investigation and Research, a three-man board created by the Transportation Act of 1940 and appointed by the President.[28] The latter report, after describing the Commission's practice in detail—the identical practice that was followed in this case—referred to 18 cases decided by the Commission in 1940 and 1941 in which it granted temporary relief without a hearing and, after hearing, entered final orders.[29] An excerpt from that report is set forth in Appendix B, *infra*, pp. 56-57. Since 1940, the only change in Section 4 has been to relax its prohibitions; a proviso permitting carriers operating over certain circuitous rail routes to meet

[25] 54 Stat. 904.
[26] S. Rep. No. 433, 76th Cong., 1st Sess., 32.
[27] S. Doc. No. 10, Part 11, 77th Cong., 1st Sess., 46-47.
[28] H. Doc. No. 678, 78th Cong., 2d Sess., 187-188.
[29] *Id.*, at 189.

the charges of carriers operating over a more direct line was added in 1957.[20]

In 1960, the water carriers caused to be introduced a bill which would have required, on the protest of a water carrier, a hearing before a railroad could be granted Section 4 relief.[21] Testifying on the bill, Chairman Winchell of the Commission vigorously opposed its restrictions on Commission powers, largely on the ground that the delays it would entail would bar the grant of timely relief to prevent diversion of existing railroad traffic to other modes of transportation.[22] The bill was never reported by the Committee, and Section 4 still requires only an "investigation"—not a "hearing"—before relief may be granted.

In sum, Congress has not only consistently refused to require the Commission to hold hearings before granting Section 4 relief, but has specifically acted to shorten the very procedure whose failure to include hearings has provoked such extended controversy. Although the testimony given before Congress in 1937 and 1938 showed that the Commission had not altered its practice as reported 15 years earlier, Congress proceeded to integrate the procedures under Section 4 and for filing tariffs, in order to expedite still further the procedures for obtaining fourth section relief. This action by Congress to speed up the grant of fourth

[20] 71 Stat. 292.

[21] S. 1881, 86th Cong., 1st Sess.

[22] Hearings on the Decline of Coastwise and Intercoastal Shipping Industry Before the Merchant Marine and Fisheries Subcommittee, Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess., 568.

section relief is inconsistent with any intent to require that a hearing precede such relief. The Congressional intent to ease the burden which Section 4 imposes on the railroads, rather than to increase it (which requiring a hearing would cause), is also shown by the recent exemption of circuitous rail routes from the prohibition. In short, the traditional practice of granting fourth section relief without formal hearings has received the "*de facto* acquiesence and ratification" of Congress. Cf. *Power Reactor Co.* v. *Electrical Workers,* 367 U.S. 396, 408–409; *United States* v. *Bergh,* 352 U.S. 40, 46–47.

B. THE COMMISSION MAY GRANT TEMPORARY FOURTH SECTION RELIEF AFTER AN INFORMAL INVESTIGATION, EVEN THOUGH IT SIMULTANEOUSLY INSTITUTES A FORMAL INVESTIGATION OF THE APPLICATION FOR PERMANENT RELIEF

The Act authorizes the Commission to grant fourth section relief only "after investigation." Appellants argue (Br. 31–32, 36) that the Commission's initiation of a formal investigation of the application for permanent relief at the same time that it granted temporary relief, shows that the Commission had not made the requisite statutory "investigation" when it granted temporary relief. This argument overlooks a basic distinction between the two types of investigation, and fails to recognize the well-established authority of administrative agencies to take action that, although itself meeting the statutory standards, may be subject to reconsideration after further examination and study. (To the extent that the argument rests on the claim that the statutory "investigation" includes an

evidentiary hearing (App. Br. 32–33), we have already answered it in Point IIA, *supra*, pp. 35–41).

As we have pointed out in the Statement (*supra*, p. 6), the Commission, when it institutes a formal investigation (which includes a hearing) of an application for fourth section relief, frequently gives temporary interim relief. The Commission decides whether to grant temporary relief on the basis of the application, the protest, and any comments by interested parties. As shown by the recent order granting temporary relief (see Appendix A, *infra*), the Commission will not do so unless it concludes that the statutory criteria governing fourth section relief are satisfied, namely, that there is a "special case" (*i.e.*, one in which the lower long-haul rates are designed to meet competition), that such long-haul rates are reasonably compensatory, and that, if such rates are designed to meet water competition, the latter is actual and not merely potential. If the Commission cannot find that these standards are met, it does not grant temporary relief.

The application for fourth section relief is a lengthy document, which is required to provide detailed information on all significant aspects of the proposal (see 49 C.F.R. 143.75–143.85). It supplies the Commission with sufficient data to enable the agency to make an informed judgment whether temporary relief would be consistent with the standards of Section 4. The Commission gives the application and related papers careful and detailed study and consideration. Such study and consideration constitute an adequate "investigation," within the meaning of

Section 4, to justify granting temporary relief where the Commission concludes that the statutory criteria are satisfied.

The formal investigation and hearing of the application for permanent relief is designed to permit further exploration of the issues than was possible in the Commission's consideration of the need for temporary relief. In the formal investigation, interested parties can present evidence and develop fully all the facts relating to the proposed rate schedule. But the initiation of such formal investigation provides no basis for implying that the earlier informal investigation, on the basis of which the Commission granted temporary relief, was in any sense inadequate, or failed to meet the statutory requirement of "investigation." It merely indicates that the Commission will reexamine the original grant of temporary relief, on the basis of the record made in the subsequent hearing, to decide whether the relief should be made permanent.

Such subsequent reconsideration is not a mere formality. On occasion, the Commission has denied permanent relief after initially granting temporary relief. See, *e.g.*, the *Dixie Carriers* case, *supra*, pp. 20–21; *Steel Pipe From the East to the Southwest*, 301 I.C.C. 203.

The Commission's practice in granting temporary relief in such circumstances is neither novel nor without judicial support. So-called "conditional grants" of operating authority are frequently made by administrative agencies, even though there is no specific authorization therefor in the regulatory statute. See,

e.g., Community Broadcasting Co. v. *Federal Communications Commission,* 274 F. 2d 753 (C.A.D.C.) (conditional grant of broadcasting authority pending comparative hearing on assignment of frequencies).

This Court's decision in the *New England Divisions Case,* 261 U.S. 184, supports the validity of the Commission's practice of granting temporary relief upon a thorough informal investigation of the proposal, subject to further consideration upon completion of the formal investigation. That case arose under Section 15(6) of the Interstate Commerce Act (49 U.S.C. 15(6)), which authorizes the Commission to prescribe, "after full hearing," the divisions of joint rates among carriers who are parties to the rates. The railroads of New England instituted proceedings before the Commission to obtain larger portions of the rates on freight moving between that section and the rest of the country. After lengthy hearings, the Commission increased the divisions of the New England railroads by 15 percent. The order "was to continue in force only until further order of the Commission. And it left the door open for correction upon application of any carrier in respect to any rate" (261 U.S. at 187).

One of the grounds upon which the order was challenged was that it (pp. 199–200)—

> directs a transfer of revenues of the western carriers to the New England carriers, pending a decision in the matter of divisions; that Congress has not granted authority to take such provisional action; and that, hence, the order is void. The argument is, that under § 15(6),

> the Commission may prescribe divisions only when, upon full hearing, it is of opinion that those existing are, or will be, unjust, unreasonable or inequitable; that in such event it shall prescribe divisions which are just, reasonable and equitable; and that the provisional character of the order demonstrates that the hearing has not been a full one.

In rejecting this argument a unanimous Court, speaking through Mr. Justice Brandeis, pointed out (p. 200) that "[w]hether a hearing was full, must be determined by the character of the hearing, not by that of the order entered thereon." The Court stated (p. 201):

> A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made. To grant under such circumstances immediate relief, subject to later readjustments, was no more a transfer of revenues pending a decision, than was the like action, in cases involving general increases in rates, a transfer of revenues from the pockets of the shippers to the treasury of the carriers. That the order is not obnoxious to the due process clause, because provisional, is clear. If this were not so, most temporary injunctions would violate the Constitution.

The reasoning of the *New England Divisions Case* is equally applicable to the present case. If Mr. Justice Brandeis' language is paraphrased, and then

applied to the Commission's practice of granting temporary authorization by substituting the word "investigation" for the words "full hearing," it would read as follows:

> The Commission's informal investigation, made before granting temporary relief, constitutes the kind of investigation required by Section 4, even though it does not enable the Commission to dispose of the issues completely or permanently; and although the Commission is convinced, [or at least assumes,] when entering the order thereon, that, upon further investigation, some changes in it will [or may] have to be made. Whether the kind of investigation made by the Commission satisfied the statute must be determined by the character of the investigation, not by that of the order entered thereon.

The Commission's long-standing practice of granting temporary relief, pending a hearing on permanent relief, is also supported by the history of Congressional knowledge of, and acquiescence in, such practice. As we have shown (*supra*, pp. 36–41), the practice was frequently called to the attention of Congress, but the legislature rejected all attempts to require a hearing prior to the grant of temporary relief.

CONCLUSION

The judgment of the district court dismissing the case as moot should be affirmed. If this Court concludes, however, that the case is not moot, the appropriate disposition, in view of the government's admission that the order granting temporary relief is invalid for lack of findings, would be to reverse the judgment and remand with instructions to vacate the Commission's order.

Respectfully submitted.

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OCTOBER 1961.

APPENDIX A

Fourth Section Order No. 19540

Order

At a Session of the Interstate Commerce Commission, Fourth Section Board, held at its office in Washington, D.C., on the 10th day of May, A.D. 1961

COMMODITY RATES—SEA-LAND SERVICE, INC.

By fourth-section application No. 36983, as amended, Sea-Land Service, Inc., for itself and on behalf of motor carriers named in the application, applies for authority to establish and maintain a rate of 121 cents per 100 pounds, minimum 70,000 pounds, for the transportation of synthetic plastic materials, in carloads, as more fully described in the application, from Orange, Tex., to Port Newark, N.J., without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act.

By a petition dated May 2, 1961, Seatrain Lines, Inc., seeks denial of fourth-section application No. 36983, as amended.

Seatrain Lines, Inc., contends that applicants' proposal to maintain from Houston, Tex., to Port Newark, N.J., and from Orange, Tex., to Philadelphia, Pa., and Baltimore, Md., rates higher than from more distant Orange, Tex., and to more distant Port Newark, N.J., has not been justified; that the proposed rate is lower than necessary to meet the competition now existing at Port Newark, N.J., or the competition now existing between Port Newark, N.J.,

and Seatrain Lines, Inc., port of Edgewater, N.J.; and that the proposed rate will not return earnings which will be reasonably compensatory for the service performed.

A full investigation of the matters and things submitted in this proceeding has been made. Consideration has been given to the application, as amended, to the protest of Seatrain Lines, Inc., and to the reply of Sea-Land Service, Inc., to that protest.

With respect to the matter of competition at the intermediate points of Houston, Tex., Philadelphia, Pa., and Baltimore, Md., it appears that the competitive situation existing between the Sea-Land Service, Inc., port of Port Newark, N.J., and the Seatrain Lines, Inc., port of Edgewater, N.J., either does not exist at the intermediate points, or where such competition does exist the rates over the competing routes have been equalized.

In consideration of the question of competition at Port Newark, N.J., raised in the protest, it is clear that the prayer for relief in application No. 36983 is not based on such competition, but on the competition between Sea-Land Service, Inc., port of Port Newark, N.J., and the Seatrain Lines, Inc., port of Edgewater, N.J. In establishing to Port Newark, N.J., a rate approximately the same as its competitor's costs to Edgewater, N.J., it does not appear that Sea-Land Service, Inc., is engaging in destructive competition, as its receiver at that point has stated that, without an approximate equalization of costs, it will be necessary to eliminate its warehousing arrangements at Port Newark, N.J., and reestablish them at a point nearer Edgewater, N.J., so it can take advantage of the lower costs of Seatrain Lines, Inc. It further appears that, if Sea-Land Service, Inc., does not accomplish such an approximate equalization of costs, it will lose its present traffic to Port Newark, N.J.

With respect to the reasonably compensatory nature of the proposed rate, it is found that the fully distributed costs of applicant carriers for the service to be performed, based on a weight of 70,000 pounds, are 111 cents per 100 pounds, as compared to the proposed rate of 121 cents per 100 pounds, minimum 70,000 pounds. Earnings which exceed fully distributed costs must be considered as reasonably compensatory.

Upon consideration of the matters and things involved in application No. 36983, as amended, in the protest dated May 2, 1961, filed by Seatrain Lines, Inc., and in applicants' reply to that protest, which application, protest, and reply are hereby referred to and made a part hereof, it appears that a grant of the relief prayed is warranted, therefor:

It is ordered, That, effective May 15, 1961, to the extent permitted by the statute, and until the effective date of the further order to be entered after hearing to be held in application No. 36983, as amended, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed direct route, for the transportation of synthetic plastic materials, in carloads, minimum 70,000 pounds, as more fully described in the application, from Orange, Tex., to Port Newark, N.J., a rate of 121 cents per 100 pounds, as proposed in the application, and to maintain higher rates from and to intermediate points; *Provided,* That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination on rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in

conflict with any provision of the Interstate Commerce Act.

By the Commission, Fourth Section Board.

[SEAL] HAROLD D. MCCOY, *Secretary.*

APPENDIX B

Excerpt from the *Report on Practices and Procedures of Governmental Control*, by the Board of Investigation and Research (H. Doc. 678, 78th Cong., 2d Sess.), pp. 187–188:

> When it is found upon preliminary examination of an application that the facts and circumstances presented appear to warrant the granting, temporarily, of the relief prayed, or some measure of relief, pending further investigation and possible assignment for hearing, a memorandum report is prepared by the Board and submitted to Division 2 with the Board's conclusions and recommendation that such relief be granted. The purpose of the temporary relief is to permit the carriers to proceed immediately with the establishment of rates in connection with which the relief prayed appears, prima facie, to be justified. * * *
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> Section 4 was revised by the Transportation Act of 1940, a clause being added which provides that tariffs proposing rates subject to this section may be filed at the same time that application for fourth section relief is made. This new clause has made the matter of temporary relief important in connection with a large number of applications. Under the provisions of section 6 of the act, tariffs become effective, unless suspended, 30 days after filing with the Commission. It is necessary, therefore, to give expedited consideration to applications covering rates included in tariffs contemporaneously filed, in order to take some action upon them, if possible, before the expiration of the 30-day period. If such an ap-

plication cannot be disposed of within that time, or if the relief prayed is found to be not justified, the new tariff must be suspended to prevent rates which violate section 4 from going into effect. As it is frequently not possible to complete the necessary investigation of such applications within the short time available, temporary relief must be granted in those instances in which it appears warranted by the circumstances, until the investigation can be concluded.

In a considerable number of cases it will appear, without need of prolonged investigation of the facts and circumstances presented in the application, either that a special case has been established justifying relief from the provisions of section 4 as prayed, subject to such conditions as the Commission may find to be appropriate, or that there is no adequate ground for relief. These cases are disposed of without hearing, and since the decision will be reached quickly it is not necessary to consider the matter of temporary relief. Of the 125 applications tabulated below, 64 involved neither hearings nor action on temporary relief and were disposed of in an average of 22.1 days each. * * *

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